

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KIETH FRANKLIN SHELTON	§	
v.	§	CIVIL ACTION NO. 6:07cv306
		(Crim. No. 6:06cr4)
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Movant Kieth Shelton, proceeding *pro se*, filed this motion to vacate or correct sentence under 28 U.S.C. §2255 complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Shelton was convicted of possession of a firearm by a felon on March 30, 2007, receiving a sentence of 34 months in prison. In his petition, he complains that the sentencing court failed to adjust his sentence because a concurrent state conviction was used to enhance his federal sentence. He cites U.S. Sentencing Guideline §5G1.3 in support of this claim. Shelton also complains that he received ineffective assistance of counsel at the sentencing proceeding.

The Government contends that Shelton's claims are barred by the waiver of appeal provision in the plea agreement and that his ineffective assistance lacked merit even were it not barred. Shelton replies that he pleaded guilty expecting to receive the credit and that the Government is "stalling." He also attached a letter showing that his sentence computation had been revised to reflect a release date of April 22, 2008.

On February 15, 2008, the Magistrate Judge issued a Report recommending Shelton's motion to vacate or correct his sentence be denied. The Magistrate Judge determined that Shelton's

claims were barred by the waiver of appeal provision, that he did not show that he received ineffective assistance of counsel or that he had relied upon a promise given to him in pleading guilty, and that Shelton's claim was one of a technical misapplication of the Guidelines and that such a claim was not a constitutional issue cognizable under Section 2255. The Magistrate Judge therefore recommended that the motion to vacate or correct sentence be denied and that Shelton be denied a certificate of appealability *sua sponte*.

Shelton filed objections to the Magistrate Judge's Report on March 4, 2008. In his objections, Shelton insists that his attorney was ineffective and that the Magistrate Judge "entered into a broad range of issues that is [sic] not germane to the instant proceeding." He also says that the recalculation of his time credits by the Bureau of Prisons has recently been rescinded. Shelton does not mention the applicability of the waiver of appeal, nor the fact that technical misapplication of the Guidelines is not a basis for Section 2255 relief. His objections are without merit.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the Movant's motion to vacate, the answer and amended answer filed by the Government, Shelton's responses to these answers, the Report of the Magistrate Judge, the Movant's objections thereto, and all pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Movant are without merit. It is accordingly


ORDERED that the Movant's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled motion to vacate or correct sentence be and hereby is DISMISSED with prejudice. It is further

ORDERED that the Movant Kieth Shelton is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby
DENIED.

SIGNED this 6th day of March, 2008.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE